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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff, v. AMERICAN CIVIL RIGHTS COALITION, INC., WARD CONNERLY, and DOES 1-50, Defendants.	Case No.: 03AS04882 FPPC No.: 02/522 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SPECIAL MOTION TO STRIKE COMPLAINT (CCP § 425.16) Date: November 21, 2003 Time: 9:00 A.M. Dept: 54 Judge: Hon. Thomas Cecil Date Action Filed: September 3, 2003 No Trial Date Set

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I. INTRODUCTION

In this motion, defendants American Civil Rights Coalition, Inc. (hereinafter "ACRC") and Ward Connerly seek to strike the complaint of plaintiff Fair Political Practices Commission (hereinafter "Commission") in this matter under Code of Civil Procedure section 425.16. As set forth in detail below, defendants' motion is procedurally defective and substantively without merit, and should be denied.

II. STATEMENT OF FACTS

As this court is aware, the Commission brought an enforcement action under the Political Reform Act (the "Act")[1] seeking preliminary and permanent injunctive relief, and civil penalties based on allegations that defendants refused to disclose the names of persons contributing to defendant ACRC to support the qualification and passage of Proposition 54, the so-called "Racial Privacy Initiative."

The Commission maintains its position, as presented to the court in the Commission's motion for preliminary injunction, that under regulation 18215, once defendant ACRC made contributions of $1,000 or more in a calendar year to support the qualification and/or passage of Proposition 54, the subsequent donations made to defendant ACRC were "contributions" to defendant ACRC within the meaning of the Act, qualifying defendant ACRC as a committee, and giving rise to periodic campaign reporting obligations, which includes the obligation to identify its contributors. (§§ 82013, subd. (a); 84201; and 84211, subd. (f).) This is the so-called "one-bite" or "second bite" rule that was referred to by the parties in their previously filed papers concerning the preliminary injunction motion. (Defendants' Opposition to Motion for Preliminary Injunction and Memorandum in Support Thereof, at pp. 7:14-9:4; Plaintiff's Reply to Defendants' Opposition to Motion for Preliminary Injunction and Memorandum in Support Thereof at pp. 4:7-6:17.)

Plaintiff presented conclusive evidence, as set forth in Exhibits A-J attached to the Declaration of Sue Straine in Support of Motion for Preliminary Injunction, to the effect that defendant ACRC

[1] The Political Reform Act is contained in Government Code §§ 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in §§ 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

contributed $1,000 or more to support the qualification and/or passage of Proposition 54 in 2001, which by the operation of regulation 18215, subdivision (b)(1), made subsequent donations to defendant ACRC in 2002 and 2003 contributions that were required to be disclosed under the Act. (§§ 84201 and 84211, subd. (f).) That same evidence established that defendant ACRC went on to contribute over $1,000,000 in support of Proposition 54 in 2002 and 2003. Ergo, under the one-bite rule, contributors to defendant ACRC in 2002 and 2003 were required to be disclosed in the course of mandatory campaign reporting.

In this court's tentative ruling issued prior to the September 19, 2003 hearing on the motion for preliminary injunction, the court stated in pertinent part as follows:

> Upon the record presented, the Court finds that the FPPC has not demonstrated a likelihood that it will ultimately prevail on the merits of the action. Further, the potential irreversible constitutional injury that could be occasioned to Defendants and their contributors by the compelled disclosure sought by the State if the operative statutes and regulations are later found to be constitutionally deficient, significantly outweighs the potential harm that may be suffered by the voting public in having to cast their votes on the subject measure based upon its merits without also knowing the identity of some of the people or entities that gave financial support to ACRC which in turn supported the subject measure.

When queried by plaintiff's counsel at the September 19, 2003 hearing as to why the court did not believe that plaintiff had demonstrated a likelihood it would prevail on the merits, this court stated that even if the presumption of the donors' initial lack of knowledge [under regulation 18215] was negated by defendant ACRC's contributions supporting Proposition 54, that did not create a presumption that subsequent donors to ACRC had knowledge that their subsequent donations would be used to support Proposition 54. In other words, this court disagreed with the Commission's long-standing interpretation of regulation 18215, subdivision (b)(1).

While plaintiff will be requesting that this court reconsider its position regarding the operation of regulation 18215, plaintiff is herewith presenting additional evidence of what ACRC donors knew or had reason to know about how their donations would be used, in order to meet its burden in opposition to the instant motion, if the court should reach that issue. In the Declaration of Sue Straine in Opposition to Defendants' Special Motion to Strike (hereinafter the "Straine Declaration"), she sets forth further statements by defendant Connerly from a June 17, 2003 interview conducted by

Commission staff. In that interview, defendant Connerly stated he would "absolutely not" disclose the names of contributors to ACRC, as he had represented to contributors that their names would not be disclosed. (Straine Declaration p. 2: 20-24.) Defendant Connerly also related that "…one very large donor…said 'I've heard about this Racial Privacy Initiative, I don't want my money going into it." (Straine Declaration p. 2:25-28.)

As part of her investigation, on July 23, 2002, Supervising Investigator Straine also examined the official website of defendant ACRC. (Straine Declaration p. 3:1-2, Exhibit A attached thereto.) On the ACRC website, there was a "link" denominated "RPI Campaign." (Ibid.) This link connected the website visitor to a webpage that provided information regarding qualification of the Racial Privacy Initiative, and that webpage contained a link to a contribution/ support form for the Racial Privacy Initiative. (Straine Declaration p. 3:2-3, Exhibit B attached thereto.) The RPI webpage linked to the ACRC website also included a partial list of persons endorsing Proposition 54. (Straine Declaration p. 3:4-5.) In the June 17, 2003 interview, defendant Connerly acknowledged that the endorsers of Proposition 54 listed on the linked webpage had made contributions to ACRC, stating: "I am sure they did. Which ones and how much, I don't know that information." (Straine Declaration p. 3:14-19.)

In her investigation, Supervising Investigator Straine also obtained tax returns of defendant ACRC. (Straine Declaration p. 3:20-25; Request for Judicial Notice, filed herewith.) Defendant ACRC's 2001 tax return disclosed two major financial supporters of defendant ACRC for "ballot initiative funding." (Ibid.) This tax return also disclosed a loan of $250,000 from Joseph Coors, who was listed on the ACRC website as an endorser of Proposition 54. (Ibid., see also Exhibit A, attached to the Straine Declaration.)

III. ARGUMENT

A. DEFENDANTS' NOTICE OF MOTION WAS UNTIMELY FILED AND SERVED IN VIOLATION OF MANDATORY PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 425.16.

Section 425.16, subdivision (f) states:

> The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion **shall** be noticed for hearing **not more than 30 days after service** unless the docket conditions of the court require a later hearing. [Emphasis added.]

Defendants filed and served plaintiff with the Notice of Motion for the instant hearing on October 8, 2003. (Proof of Service, Defendant's Notice of Motion and Special Motion to Strike Complaint.) In the Notice of Motion, defendants unilaterally set the hearing for November 21, 2003, forty-four days after filing and service of the Notice of Motion. (Id.) On October 31, defendants personally served plaintiff with their supporting papers for the Notice of Motion. (Proof of Service, Defendants' Points and Authorities in Support of Special Motion to Strike.) Defendants' moving papers contain no explanation, let alone evidentiary support, for docket conditions that might have required an extension of the maximum 30-day notice set forth in subdivision (f), above. (Id.)

In *Decker v. U.D. Registry* (2003) 105 Cal.App.4th 1382, the Fourth District Court of Appeal held that the maximum 30-day time frame set forth in Code of Civil Procedure section 425.16, subdivision (f) was mandatory, and a court could not grant an anti-SLAPP motion in violation of the statute. After discussing the legislative history of the statute and the unambiguous use of the word "shall" in relation to the "not more than 30 days" time limit between service of the notice and the hearing, the court stated:

> Any ambiguity in the anti-SLAPP statute must be resolved in favor of a resolution on the merits (*Lam v. Ngo, supra*, 91 Cal.App.4th at p. 842), but we find no ambiguity. The word "shall" in section 425.16, subdivision (f), is mandatory. UDR failed to notice its special motions to strike for a hearing date "not more than 30 days after service" of the motions, and failed to show "the docket conditions of the court required a later hearing." (§ 425.16, subd. (f).) **The trial court therefore could not grant UDR's special motions to strike.**
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> (*Decker* at 1390, emphasis added.)

Decker is directly on point as to defendants' untimely filing of the Notice of Motion in the instant case. Based upon the separate filing of the Notice of Motion on October 8, 2003, and the filing of supporting papers on October 31, 2003, it is difficult to escape the conclusion that defendants were trying to foreclose discovery as early as possible, while still gaining the tactical advantage of filing and serving their supporting papers as late as possible under the law and motion rules.[2] (See Code of Civ. Proc. § 1005, subd. (b).) This would appear to be precisely the type of potential tactical abuse in

[2] Defendants' separate filing of their Notice of Motion and Memorandum of Points and Authorities also violates the California Rules of Court pertaining to law and motion procedures. (Cal. Rules of Court, rule 313, subd. (a).)

"prolonging" the discovery stay under the anti-SLAPP statute that was alluded to in *Decker* as the rationale for the mandatory maximum 30-day notice provision. (*Decker v. U.D. Registry, supra*, 105 Cal.App.4th 1382, 1388-1390.) Further, *Decker* makes clear that the convenience of the party is not an appropriate basis for hearing the motion on more than 30-days notice. (*Id.* at 1388.) Regardless of defendants' reasoning for their early filing of the Notice of Motion for the Special Motion to Strike, defendants failed to demonstrate any docket conditions requiring a later noticed hearing. Because defendants violated the mandatory service provision of section 425.16, subdivision (f), defendants' motion must be denied.

B. THE ANTI-SLAPP STATUTE DOES NOT APPLY TO ENFORCEMENT ACTIONS BROUGHT BY THE COMMISSION UNDER THE POLITICAL REFORM ACT.

Code of Civil Procedure section 425.16, subdivision (d) states:

> This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as public prosecutor.

Contrary to defendants' summary treatment of *City of Long Beach v. California Citizens for Neighborhood Improvement* (2003) 111 Cal.App.4th 302 as "inapposite" in their memorandum of points and authorities in support of the instant motion, *City of Long Beach* is directly on point in the instant case. (Defendants' Memorandum of Points and Authorities In Support of Special Motion to Strike p. 7, fn. 3.) In *City of Long Beach*, the Second District Court of Appeal, looking to the legislative intent of the anti-SLAPP statute, held that Code of Civil Procedure section 425.16 could not be applied to a civil enforcement action by the city of Long Beach under the city's local campaign ordinance. The court stated in pertinent part:

> As discussed in *Health Laboratories*, an examination of the legislative history of section 425.16 shows there was concern on the part of the state Attorney General that the statute as initially introduced (without the exemption [of subdivision (d)]) might impair the ability of state and local agencies to enforce certain consumer protection laws. (*People v. Health Laboratories of North America, Inc., supra*, 87 Cal.App.4th at pp. 446-447.) The version finally signed into law contained the exemption at issue here. Although, as respondents point out, the literal language of the exemption does refer to actions "brought in the name of the people of the State of California," it is reasonable to infer that the measure was designed to address the Attorney General's concern, which extended **to all civil actions brought by state and local agencies to enforce laws aimed at consumer and/or public protection.**

(*City of Long Beach, supra,* at pp. 307-308, emphasis added.)

The rationale for not applying the anti-SLAPP statute to enforcement actions by state and local agencies applies with even greater force to enforcement actions by the Commission. "The manifest purpose of the financial disclosure provisions of the Act is to insure a better informed electorate and to prevent corruption of the political process." (*Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 532.) The Commission is expressly charged with "primary responsibility for the impartial, effective administration and implementation" of the Act. (Gov. Code § 83111.)

The Commission's primary role in civil enforcement of the Act is set forth at Government Code section 91001, subdivision (b) as follows:

> The civil prosecutor is primarily responsible for enforcement of the civil penalties and remedies of this title. The civil prosecutor is the commission with respect to the state or any state agency, except itself.

Additionally, Government Code section 82003 states that the Act "should be liberally construed to accomplish its purposes." Furthermore, the Act is to be "vigorously enforced." (Gov. Code § 81002, subd. (f).) The Commission, as an administrative body, is constitutionally bound to enforce the provisions of the Act, irrespective of its assessment as to their constitutionality. (California Constitution, Art. 3, § 3.5.) Just as in *City of Long Beach*, the Commission is carrying out its statutory mandate in prosecuting the instant enforcement action, and it cannot reasonably come within the purview of the anti-SLAPP statute.

Finally, the purposes behind the Act itself, and the provisions of the Act that were instituted to inhibit subsequent legislative action that might thwart the accomplishment of those purposes, support the conclusion that the Commission's enforcement of the Act should not, and was not intended to be, subject to an impediment such as the instant anti-SLAPP motion. As noted above, one of the voters' fundamental purposes in establishing the Act was to ensure that the Act's provisions be "vigorously enforced." (Gov. Code §81002, subd. (f).) To protect the ability of the Commission to vigorously enforce the Act, Government Code section 83122 provides for a minimum appropriation that shall be approved every year to finance the Commission's activities. Further, Government Code section 81012 provides that in order to amend the Act, the Legislature must obtain the approval of a two-thirds majority in each house. Under defendants' reading of the anti-SLAPP statute, by virtue of the nature of

the activity regulated by the Act, almost any civil enforcement action undertaken by the Commission would be subject to an anti-SLAPP motion. (See *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.) Obviously, allowing anti-SLAPP motions in response to almost every civil enforcement action by the Commission under the Act would have a significant detrimental effect on the Commission's ability to "vigorously enforce" the Act, and would constitute a de facto amendment of the Act's enforcement provisions. Therefore, defendants' overly broad reading of the anti-SLAPP statute, putting it in constant conflict with the clear intent of the Act, is inconsistent with the strictures on legislative amendment of the Act. (*Walters v. Weed* (1988) 45 Cal.3d 1, 8.)

C. ASSUMING ARGUENDO THAT THIS COURT WILL REACH THE MERITS OF DEFENDANTS' ANTI-SLAPP MOTION, DEFENDANTS ARE NOT ENTITLED TO RELEIF.

The primary burden of a litigant in defending against an anti-SLAPP motion is set forth at subdivision (b)(1) of Code of Civil Procedure section 425.16 as follows:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Under subdivision (b)(1), the determination of the validity of an anti-SLAPP motion is subject to a two-part analysis:

> Section 425.16 articulates a "two-step process for determining whether an action is a SLAPP." [citations]" 'First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. [Citation.] If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that "there is a probability that the plaintiff will prevail on the claim." [Citations.] The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]' [Citation.]" [Citations] "Only a cause of action that satisfies both prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning **and lacks even minimal merit**--is a SLAPP, subject to being stricken under the statute." [Citation]
>
> (*Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

Plaintiff concedes that, if this court determines that the anti-SLAPP statute is applicable to an enforcement action by the Commission, the cause of action in the instant enforcement action arises from acts "taken in furtherance of [defendants'] constitutional rights of petition or free speech in connection with a public issue." (Id. at pp. 457-459.) However, plaintiff contends in the strongest possible terms that the instant suit has at least the "minimal merit" necessary to overcome defendants' special motion to strike.

Defendants are proceeding in this motion as if this court's prior ruling regarding the preliminary injunction has collateral estoppel effect in the instant context. This is not the case. Because an anti-SLAPP motion involves consideration of different issues than a motion for a preliminary injunction, there is no collateral estoppel effect to this court's previous ruling. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 836.)

Moreover, because of the preclusive effect of an anti-SLAPP motion on a litigant's right to a jury trial, courts have construed the standard of proof for a litigant defending against an anti-SLAPP motion as being "simply to demonstrate by affidavit a prima facie case." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867.) Recently, in *Navellier v. Sletten* (2003) 29 Cal.4th 82, the California Supreme Court addressed the threshold showing that a litigant must make to overcome an anti-SLAPP motion as follows:

> [T]he statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning [citation]; it subjects to potential dismissal only those actions in which the plaintiff cannot "state and substantiate a legally sufficient claim" [citation]....**As our emerging anti-SLAPP jurisprudence makes plain, the statute poses no obstacle to suits that possess minimal merit.** [citation]
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> (*Id.* at p. 93.)

Addressing the second prong of the SLAPP analysis in the instant case, notwithstanding defendants' constitutional arguments, there really is no dispute that contributions made in support of the qualification and/or passage of a measure, such as Proposition 54, and the required disclosure of information regarding such contributions come within the legitimate scope of the Act. Indeed, defendants concede this point in forthrightly asserting:

> ACRC fully reported its expenditures, in the form of monetary and non-monetary contributions to its sponsored committee, the Racial Privacy Initiative Committee ("RPI"), [footnote omitted.] and by virtue of a special filing requirement, it was unnecessary for ACRC as a sponsor of

> RPI to file separate campaign statements, **provided its activity was fully disclosed on RPI's campaign reports.**
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> (Defendants' Memorandum of Points and Authorities In Support of Special Motion to Strike, p. 1:12-15, emphasis added.)

Similarly, in his June 17, 2003 interview with Commission Investigator Sue Straine, defendant Connerly expressed no reservations about the requirement that persons contributing directly to the RPI Committee were required to be disclosed as contributors. (Straine Declaration, p. 2:18-19.)

Accordingly, the fundamental issue in this case is whether defendant ACRC became a "committee" under the Act, requiring it to disclose its contributors in support of its effort to qualify and support the passage of Proposition 54. (§§ 82013, subd. (a); 84201; and 84211, subd. (f).) In dealing with this issue, regulation 18215 comes into play. Regulation 18215, states in pertinent part:

> (a) A contribution is any payment made for political purposes for which full and adequate consideration is not made to the donor. A payment is made for political purposes if it is:
> (1) For the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure;…
>
> (b) The term "contribution" includes:
>
> (1) Any payment made to a person or organization other than a candidate or committee, when, at the time of making the payment, the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used to make contributions or expenditures. If the donor knows or has reason to know that only part of the payment will be used to make contributions or expenditures, the payment shall be apportioned on a reasonable basis in order to determine the amount of the contribution.
>
> There shall be a presumption that the donor does not have reason to know that all or part of the payment will be used to make expenditures or contributions, unless the person or organization has made expenditures or contributions of at least one thousand dollars ($1,000) in the aggregate during the calendar year in which the payment occurs, or any of the immediately preceding four calendar years.

The Commission maintains its position that under regulation 18215, once defendant ACRC made contributions of $1,000 or more in a calendar year to support the qualification and/or passage of Proposition 54, the subsequent donations made to defendant ACRC were contributions to defendant ACRC, qualifying it as a committee, and giving rise to periodic campaign reporting obligations under

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the Act, which includes the obligation to identify its contributors. (Sections 82013, subd. (a), 84201 and 84211, subd. (f).)

The Commission is mindful of the fact that this court disagreed with this position at the preliminary injunction hearing, stating to the effect that even if the presumption of lack knowledge [under regulation 18215] was negated by defendant ACRC's contributions supporting Proposition 54, that did not create a presumption that subsequent donors to ACRC had knowledge that their subsequent donations would be used to support Proposition 54. However, the Commission respectfully requests that this court revisit the issue.

It is not the Commission's position that once a political advocacy organization, such as defendant ACRC, makes contributions of $1,000 or more in a calendar year to support the qualification and/or passage of a measure, a presumption arises that donors now know the use to which their donations will be put. Rather, it is the Commission's position that once the presumption of lack of donor knowledge is negated by the organization establishing a history of using its funds for a political purpose, subsequent donors have reason to know that their donations will be used to make contributions; thus reinforcing the common sense inference that persons contributing money to an organization know or should know what the recipient organization uses its funds for.

This is the Commission's longstanding interpretation of its regulation, and was/is well known to the regulated community, including defendants. Defendants did not even dispute the Commission's above-described operation of regulation 18215, but rather argued that the regulation was not applicable to the "type" of organization that defendant ACRC is.[3] (Compare Defendants' Opposition to Motion for Preliminary Injunction and Memorandum in Support Thereof at pp. 7:14-9:4 with Plaintiff's Reply to defendants' Opposition to Motion for Preliminary Injunction and Memorandum in Support Thereof at pp. 4:7-6:17.) The Commission also presented this court with a Commission Advice Letter[4] setting forth this long-standing administrative interpretation of the "one-bite" rule. (See the *Kenneth Hoffer*

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[3] In a not unexpected turn-about in relation to the current motion, defendants now subscribe to this court's apparent view that plaintiff must prove ACRC's donors had actual knowledge of how their donations would be used in order to prevail.

[4] Commission advice letters are a means of responding to inquiries from the regulated community regarding the operation of the PRA and Commission regulations in a concrete factual setting. (See § 83114 and regulation 18329.)

Advice Letter, I-96-280, attached to plaintiff's Request for Judicial Notice [filed on September 17, 2003 in support of the motion for preliminary injunction].)

In *Californians for Political Reform Foundation v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472, the Third District Court of Appeal discussed the deference to be afforded to the Commission's interpretation of the Act and its regulations implementing the Act as follows:

> "[B]ecause of the agency's expertise, its view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized." (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal. 3d 101, 111 [172 Cal. Rptr. 194, 624 P.2d 244]; see also *Henning v. Industrial Welfare Com.* (1988) 46 Cal. 3d 1262, 1269 [252 Cal. Rptr. 278, 762 P.2d 442] [" ' "[T]he construction of a statute by officials charged with its administration . . . is entitled to great weight". . . .' "].) The Commission is one of those agencies whose expertise is entitled to deference from the courts. (*Thirteen Committee v. Weinreb*, *supra*, 168 Cal. App. 3d at pp. 532-533.) Moreover, where the regulation at issue is one deemed necessary to effectuate the purposes of the statute, we apply a more deferential standard of review, requiring only that the regulation be reasonable. (*Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal. App. 3d 747, 757-758 [268 Cal. Rptr. 476].) This is particularly true where, as here, the quasi-legislative decisions of the Commission involve controversial issues that would entangle the courts in a "political thicket."
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> (*Id.* at p. 784.)

Plaintiff submits that the Commission's long-standing interpretation of regulation 18215, as discussed above, is reasonable, and plaintiff requests that this court not substitute its interpretation for that of the Commission in applying the regulation in the instant case. (*Ontario Community Foundation, Inc. v. State Board of Equalization* (1984) 35 Cal.3d 811, 816.)

To the extent that additional evidence of actual knowledge by the donors to defendant ACRC, as to the use of their donations, is necessary to prove the character of the donations as contributions, plaintiff has presented additional evidence in this regard, in the Declaration of Sue Straine in Opposition to Motion to Strike, filed herewith. At least one major donor to defendant ACRC stated that he was aware of Proposition 54 and that he had knowledge of defendant ACRC's support of Proposition 54. (Straine Declaration p. 2:25-28.)

The official website of defendant ACRC clearly solicited support for the qualification and passage of the Racial Privacy Initiative. Specifically, the ACRC website included an "RPI Campaign" link that took the website visitor to a webpage that contained information regarding the qualification of

the Racial Privacy Initiative for a statewide ballot, provided a partial listing of 124 persons endorsing the Initiative, and contained a link to a contribution/support form for the Initiative. (Straine Declaration p. 3:1-5, Exhibits A and B attached thereto.) Defendant Connerly stated during the June 17, 2003 interview by Investigator Straine that he was sure that some of the endorsers made contributions to defendant ACRC. (Straine Declaration, p. 3:14-19.) The above evidence more than supports a reasonable inference that a substantial number of contributors to defendant ACRC knew or had reason to know of ACRC's support for Proposition 54, and the potential that their contributions would be used to further that support.

Furthermore, two major contributors to defendant ACRC were publicly disclosed on defendant ACRC's Form 990, Return of Organization Exempt from Income Tax, for the period July 1, 2001 through June 31, 2002. (Straine Declaration, p. 3:20-25, Request for Judicial Notice, filed herewith.) One of these two contributors, Joseph Coors, was also listed as an endorser of the Racial Privacy Initiative on the ACRC official website. (Request for Judicial Notice.) As such, it is evident that at least one donor to defendant ACRC knew, or had reason to know, that his donation to defendant ACRC would be used to support the Racial Privacy Initiative.

The aforementioned evidence most certainly meets the "minimal merit" threshold set forth in *Navellier v. Sletten, supra,* 29 Cal.4th 82, 93.[5]

D. DEFENDANTS' CONSTITUTIONAL CHALLENGE TO THEIR DISCLOSURE OBLIGATION IS WHOLLY WITHOUT MERIT.

In their memorandum of points and authorities in support of the instant motion, defendants argue that regardless of whether regulation 18215 operates as the "one-bite" rule as contemplated by the Commission, or further evidence of donor knowledge is necessary to establish a duty to disclose, the mandatory disclosure of the contributors to ACRC is constitutionally impermissible. Defendants' cite as their primary authority *NAACP v. Alabama* (1958) 357 U.S. 449, for the proposition "that any interpretation [of regulation 18215, subdivision (b)] attributing or constructively attributing

[5] To the extent that this court reaches this issue and does not find that there is evidence sufficient evidence to establish the "minimal merit" of plaintiff's case, plaintiff would request that it be granted leave to move for specified discovery on this issue under § 425.16, subdivision (g).

contributions is not narrowly tailored and must be stricken as unconstitutional as applied." (Defendants' Memorandum of Points and Authorities In Support of Special Motion to Strike at p. 12:16-18.)

However, to make an argument that the regulation is unconstitutional as applied under *NAACP v. Alabama*, defendants must present evidence demonstrating harassment and intimidation. In almost the same type of campaign disclosure context as the instant case, the United States Supreme Court discussed the necessity of such a showing as follows:

> The Court of Appeals rejected appellants' suggestion that this case fits into the *NAACP vs. Alabama* mold. It concluded that substantial governmental interests in "informing the electorate and preventing the corruption of the political process" were furthered by requiring disclosure of minor parties and independent candidates, -- 171 U.S. App. D.C., at 218, -- 519 F. 2d, at 867, and therefore found no "tenable rationale for assuming that the public interest in minority party disclosure of contributions above a reasonable cutoff point is uniformly outweighed by potential contributors' associational rights," id., at -, 519 F. 2d, at 868. The court left open the question of the application of the disclosure requirements to candidates (and parties) who could demonstrate injury of the sort at stake in *NAACP vs. Alabama*. **No record of harassment on a similar scale was found in this case.** [footnote omitted.] **We agree with the Court of Appeals' conclusion that *NAACP vs. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative.**
>
> (*Buckley v. Valeo* (1976) 424 U.S. 1, 69-70, emphasis added.)

As defendants have not provided a single evidentiary declaration by anyone from the outset of this suit to establish a record of harassment and intimidation associated with the support of Proposition 54, and allusions to defendant Connerly's book do not constitute evidence, defendants have not made the threshold showing necessary to trigger analysis of the instant case under *NAACP vs. Alabama*.[6]

Additionally, defendants have expressly disavowed a facial challenge to the overall "disclosure regime of the Political Reform Act as applied to the disclosure of contributions and expenditures in connection with ballot measure advocacy…" (Defendants' Memorandum of Points and Authorities In Support of Special Motion to Strike, p. 11:16-23.) Because defendants are making no facial challenge to

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[6] Likewise, defendants' provide no authority why their "offer of proof" should be allowed in lieu of the required showing of actual evidence of intimidation and harassment. Indeed, it is difficult to see how defendants could proffer any evidence of harassment and intimidation that would set them apart from those who directly contributed to the RPI Committee, and whose identity defendants tacitly concede must lawfully be disclosed. (Defendants' Memorandum of Points and Authorities In Support of Special Motion to Strike, pp. 1:12-15, 11:16-23.)

the Act and have not made any showing potentially warranting analysis under *NAACP vs. Alabama*, there is no reason to further address their constitutional arguments. Likewise, since defendants' novel, but wholly unsupported due process argument, hinges upon the application of *NAACP v. Alabama* analysis, there is no reason to address it.

IV. CONCLUSION

Based on the foregoing, it is submitted that defendants' motion to strike plaintiff's complaint under Code of Civil Procedure section 425.16 must be denied.

Dated: November 10, 2003

FAIR POLTICAL PRACTICES COMMISSION

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